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Nos. 82-233 and 82-413

In the Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, ET AL., APPELLANTS

v.

WILLIAM F. WINTER, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM F. WINTER, GOVERNOR OF MISSISSIPPI ET AL., APPELLANTS

v.

OWEN H. BROOKS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the three-judge district court abused its discretion in declining to adopt as an interim congressional apportionment plan the State's newly-enacted plan, Senate Bill No. 2001, 1981 Miss. Laws (Extra. Session) ch. 8 ("S.B. 2001"), to which the Attorney General had objected pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the district court properly exercised its discretion in choosing an apportionment plan that remedied the Attorney General's Section 5 objection to the state legislature's plan and best furthered the political policies embodied in the state legislature's redistricting plan.

3. Whether the judgment of the district court should be vacated and the case remanded so that the court can consider whether the interim plan is consistent with Section 2 of the Voting Rights Act of 1965 as amended on June 29, 1982.

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Constitution and statutes:

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This brief is filed in response to the Court's invitation to the Solicitor General to express the view of the United States.

STATEMENT

1. After the 1980 Decennial Census, the State of Mississippi learned that due to population movements within the State its preexisting congressional districting plan had become malapportioned (J.S. App. 3a).[1] Accordingly, the

[1] "J.S. App." refers to the appendix to the Jurisdictional Statement in No. 82-233.

State legislature set about the complex task of redistricting the five congressional districts. This, of course, was not the first time that the Decennial Census had forced Mississippi's legislature to reapportion the State's congressional districts, and, indeed, an explanation of prior redistricting plans—necessitated by the State's loss of a seat after the 1960 Census — is required to understand fully the controversy surrounding the 1981 plan.

Prior to the 1960 Census, Mississippi had six congressional districts. One of them, District 3, defined by a north-south boundary, encompassed an area almost coextensive with the eleven majority black counties of the so-called Delta area, and the black population in that district comprised about 65% of the total (J.S. App. 14a). In 1962, forced to redistrict because the 1960 Census reduced by one the number of congressional seats available to the State, the legislature combined what was then District 3 with then District 2 (82-233 J.S. 18). The resulting malapportioned district was 59% black and had a black voting-age population of about 52% (*id.* at 19).

In 1966, while litigation over the validity of the 1962 plan was pending,[2] the state legislature enacted House Bill No. 911, 1966 Gen. Laws 1251, which again attempted to reapportion the congressional districts. The plan radically altered the three northernmost congressional districts by drawing the district lines from east to west instead of from north to south. The heavily-black Delta counties were divided among four of the five districts, with the black

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[2]On October 19, 1965, eight black voters filed suit on behalf of themselves and others similarly situated, in the United States District Court for the Southern District of Mississippi alleging that the new districts were unconstitutional, both because of population disparities and because of racial unfairness. See *Connor* v. *Johnson*, 279 F. Supp. 619, 621-622 (S.D. Miss. 1966), aff'd mem., 386 U.S. 483 (1967).

population constituting 43% in District 2 and 51% in District 1. The 1966 plan was not submitted for pre-clearance to either the Attorney General or the United States District Court for the District of Columbia as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.[3]

In 1972, the Mississippi legislature again enacted a new congressional districting plan to adjust for the 1970 Census. That plan made little change in the existing districts, and no district in the 1972 plan had a black population majority.[4]

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[3]After the legislature redistricted the State, the *Connor* plaintiffs (see note 2, *supra*) amended their complaint to allege that the purpose and effect of the 1966 redistricting scheme were racially discriminatory. The three-judge district court held, however, that "one factor, and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state *and that factor is population.*" *Connor* v. *Johnson, supra,* 279 F. Supp. at 623 (emphasis in original; citations omitted). The district court also found that the plaintiffs, whose proof of racial animus had been based largely on newspaper accounts of the legislature's action, had "wholly failed their burden of proof" with respect to racial purpose because "solemn acts of Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports" (*id.* at 623-624). This Court summarily affirmed. 386 U.S. 483 (1967).

[4]The 1972 plan was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. No objection under Section 5 was interposed and the then Assistant Attorney General for the Civil Rights Division explained (Ex. P-1, Attachment P, Letter from Assistant Attorney General Norman to Mississippi Attorney General Summer (May 30, 1972)):

> The Attorney General will not object to House Bill 448. The basis of this decision is our reading of *Connor* v. *Johnson,* 279 F. Supp. 620 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

It was against this background that the State legislature in August 1981, again adjusted the boundaries of Mississippi's congressional districts to deal with population changes reflected in the 1980 Census. After a thorough review of a number of alternative proposals (J.S. App. 8a), the legislature enacted Senate Bill 2001, 1981 Gen. Laws (Extra. Session ch. 8). As in 1972, the plan that the legislature chose was one that kept the basic scheme of east-west lines dividing the predominantly black Delta and creating no district with a black population majority.[5]

2. On November 10, 1981, the State submitted S.B. 2001 to the Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (J.S. App. 25a). The submission was completed on January 29, 1982, and on March 30, 1982, the Assistant Attorney General for the Civil Rights Division interposed an objection to the legislature's plan. The objection letter (J.S. App. 25a-29a) noted that the black population of the State, which is approximately 35% of the total population, "in large part is still concentrated in the Delta region" (*id.* at 27a). That region is divided by horizontally-drawn district lines "in such manner as to dismember the black population concentration and effectively dilute its voting strength" (*ibid.*). The letter further pointed out that alternative proposals, which would have avoided this fragmentation of black voting strength, had been presented to the reapportionment committee that had recommended a final plan to the legislature and the legislature's rejection of those proposals had not been adequately explained (*id.* at 28a). The letter also stated that the government had received complaints that a racially

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[5]District 2 of S.B. 2001 has a black population percentage of 47.95% as compared to 45.93% in the 1972 plan (82-233 J.S. 19).

discriminatory purpose accounted for adoption of the more dilutive scheme. Finally, the letter concluded (*ibid.*):

> The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

The Mississippi legislature adjourned several days after the objection was interposed without enacting a new plan (J.S. App. 2a-3a).[6]

3. On April 5, 1982, appellants, representing a class of all black and white voters in the State of Mississippi, filed this redistricting suit in the United States District Court for the Northern District of Mississippi (J.S. App. 3a). Appellants claimed that no lawful districting plan was then in effect in Mississippi for purposes of the upcoming 1982 congressional elections. Because of statewide population changes, the preexisting plan, adopted in 1972, had become grossly malapportioned in violation of the "one person, one vote" requirement of Article I, Section 2 of the Constitution. In addition, S.B. 2001 had been objected to by the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and thus could not be implemented. Appellants requested an injunction against both plans for the 1982 elections, and asked the court to adopt an interim plan.[7]

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[6]On April 7, 1982, the State filed suit under Section 5 of the Voting Rights Act in the United States District Court for the District of Columbia, seeking to preclear S.B. 2001 as having neither a discriminatory purpose nor effect. See note 10, *infra*.

[7]Appellants also asked the court to postpone certain election dates, viz., party primaries scheduled for June 1, 1982 (J.S. App. 3a).

In undertaking the " 'unwelcome obligation' " of prescribing a redistricting plan for Mississippi for the impending congressional elections (J.S. App. 9a), the district court first rejected the State's suggested use of S.B. 2001 as both "inappropriate and unseemly" since the plan's validity under Section 5 was open to question in light of both the Attorney General's objection (J.S. App. 10a) and the pending preclearance action in the United States District Court for the District of Columbia (see note 6, *supra*). Moreover, the court found that reliance on S.B. 2001 was unnecessary, since the court had available to it alternative proposals that properly reconciled the State's apportionment policies with federal statutory and constitutional requirements (J.S. App. 10a).

Second, the district court rejected the State's alternative suggestion that the court adopt the existing 1972 redistricting plan (J.S. App. 10a). The court found this plan with its 17.6% population variance to be "grossly malapportioned" under this Court's decisions in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969). In addition, the court found that it had alternative, properly apportioned plans available, and thus held that it would be constitutionally impermissible to adopt the 1972 plan, even on an interim basis (J.S. App. 11a).

The district court then focused on the three remaining plans that had been proposed to and rejected by the Mississippi legislature. They were the "primary Kirksey plan"—originally drafted by a black state senator—that redrew the Delta district along north-south boundaries to create a 64.37% black majority; the "fall-back" Kirksey plan, which provided a 65.81% black majority in a north-south Delta district; and the "Simpson plan," which also was drawn along a north-south boundary and produced a 53.77% black majority district. It also provided for a second district with a 45.25% black minority. The Kirksey plans were

urged on the court by appellants and the Simpson plan was presented by the AFL-CIO, acting as amicus curiae (J.S. App. 8a).

In choosing among these plans, the district court attempted to respect the State's political policies underlying the districting plan the legislature had adopted, so long as they were consistent with statutory and constitutional restrictions. See *Upham* v. *Seamon*, 456 U.S. 37 (1982). The court found that S.B. 2001 was the product of the following state policies: minimal change in the existing districts, de minimis population variations, protection of incumbents' constituencies and establishment of two districts with 40% or greater black population (J.S. App. 12a). The court found that neither Kirksey plan satisfied the policy of having two "high impact" districts,[8] which policy the court held was valid because two high impact districts can protect minority voting strength as well as one district with a black majority and other districts with a minority vote that is too insignificant to allow blacks in those districts to exercise any real political influence (J.S. App. 13a-14a).

In addition, the district court found that the Simpson plan, which did provide for a majority black district and a substantial minority black district, had "significant," affirmative advantages over the two Kirksey plans; it better preserved precinct lines and it preserved a community of interest in District 2 by restricting the district to rural, predominantly agricultural areas[9] (J.S. App. 15a).

Finally, the court rejected plaintiffs' contention that Section 5 required creation of a 65% black district in order to protect against retrogression of black voting strength.

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[8]Both Kirksey plans had second districts with a black minority population of about 33% (J.S. App. 8a).

[9]The Kirksey plans extended District 2 "into metropolitan Hinds County and the City of Jackson" (J.S. App. 14a).

Plaintiffs argued that the correct benchmark for measuring retrogression was former District 3, which had a 65.51% black majority according to 1960 census figures. Noting that retrogression must be tested against the districting plan in effect on November 1, 1964—the effective date of Section 5 coverage—the court determined that the appropriate retrogression benchmark was old District 2, measured against current population figures. The court reasoned (J.S. App. 15a):

> Of course, if the district lines in effect on November 1, 1964, had never been changed, § 5 retrogression could not be implicated, even if there was a reduction in the percentage of blacks residing in former District 2. Computations show that, under 1980 census figures, the formerly 59.29% black majority district is now comprised of only 48.09% black population. Thus, the Simpson amendment with a 53.77% majority district represents an augmentation, rather than diminution, of black voting strength.

Accordingly, the district court ordered the State to implement the Simpson plan for the 1982 congressional elections "and thereafter until a redistricting plan * * * is precleared in accordance with § 5 of the Voting Rights Act of 1965 * * *" (J.S. App. 20a).[10]

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[10]After the district court in this case adopted its interim plan, the State in its preclearance action filed a motion for partial summary judgment, asking the District of Columbia court to hold that the preexisting 1972 plan is the appropriate benchmark against which to measure S.B. 2001 for retrogression under *Beer* v. *United States*, 425 U.S. 130 (1976). The district court denied the motion and decided, instead, that S.B. 2001 should be measured against the court-ordered interim plan *i.e.*, the Simpson Plan (J.S. App. 38a). Mississippi has appealed the district court's denial of its motion for partial summary judgment, *State of Mississippi* v. *Smith*, No. 82-540 (Juris. Statement filed July 28, 1982). The government has moved to dismiss the appeal for want of jurisdiction on the ground that the order is not appealable under 42 U.S.C. 1973c.

DISCUSSION

1. The State argues on cross-appeal (82-413 J.S. 7-14) that the district court erred in declining to adopt S.B. 2001 as a court-ordered interim plan. The State supports this assertion with two arguments — (1) the Attorney General's Section 5 objection did not finally resolve the validity of S.B. 2001 under the Voting Rights Act and thus the State should have been allowed to implement its plan until the preclearance action was finally decided, and (2) the Mississippi district court's adoption of an interim plan, coupled with the District of Columbia court's use of that plan as the benchmark for measuring whether S.B. 2001 is retrogressive (*Mississippi* v. *Smith*, 541 F. Supp. 1329, 1333 (D. D.C. 1982)) has effectively foreclosed Mississippi from exercising its statutory right to seek preclearance of S.B. 2001 in a declaratory judgment action in the District of Columbia District Court (82-413 J.S. 7-12).[11] The State's first contention is legally incorrect and its second, although it may be correct, is legally irrelevant to the validity of the Mississippi district court's redistricting decision. Accordingly, the district court's order rejecting S.B. 2001 as the interim plan should be affirmed.

Contrary to the State's assertion, the pendency of the State's preclearance suit in no way restricts the redistricting court's discretion in deciding whether to adopt the State's unprecleared plan. It is settled that a three-judge redistricting court has discretion to *enjoin* implementation of a change affecting voting that is subject to preclearance, but which has not been precleared. *Canaday* v. *Lumbarton City Board of Education*, 454 U.S. 957 (1981); *United*

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[11]The practical effect the State contends (82-413 J.S. 8-9) is that: "the State of Mississippi is now in the untenable and wholly illogical position of proving to the Section 5 Court, lack of retrogression [of S.B. 2001] from a standard created after the enactment of S.B. 2001."

States v. *Board of Supervisors*, 429 U.S. 642, 644-645 (1977); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-555 (1969); cf. *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). Where alternatives are available that indisputably comply with federal statutory and constitutional requirements, it cannot be an abuse of discretion for the district court to reject, as an "interim plan," a State's districting scheme that has been expressly objected to under Section 5 by the Attorney General. The entire scheme of the Voting Rights Act, as explained in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966), was designed to "shift the advantage of time and inertia" *away* from the jurisdiction that had enacted a voting change subject to preclearance. Accordingly, the pendency of the preclearance suit is no basis for challenging the district court's refusal to adopt S.B. 2001.

The State's alternative argument that the interim plan should be overturned because the preclearance court has adopted it as the "benchmark" for evaluating whether S.B. 2001 has a retrogressive effect is also no basis for challenging the decision of the Mississippi court. This argument is no more than an attempt to litigate an issue that is clearly not relevant to this appeal and is in any event not ripe for review by this Court.[12] For reasons stated in our Motion to

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[12]The State argues (82-413 J.S. 10) that "it is devoid of all reason to charge the legislature with the responsibility of insuring that their redistricting plan will not represent a retrogression from any potential, but as yet non-existent, interim plan." The basis for that assertion does not rest, however, on the action taken by the court below, but rather on the District of Columbia district court's decision in *Mississippi* v. *Smith*, *supra*, 541 F. Supp. at 1329, to select the subsequently adopted interim plan as the retrogression benchmark for Section 5 review of S.B. 2001. While we have serious misgivings about the correctness of that separate district court determination, the proper place to address that issue is in the *Mississippi* case, either during the trial proceedings in the district court for the District of Columbia or, when properly presented on appeal, in this Court (see United States' Motion to Dismiss, No. 82-540). There is no occasion for the matter to be considered here.

Dismiss (at 3-6), in *State of Mississippi* v. *Smith*, No. 82-540, the State has filed a premature appeal from the preclearance district court's interlocutory order, declaring the interim court-ordered plan to be the benchmark in the Section 5 proceeding on whether S.B. 2001 has a discriminatory effect. We did not address the merits of the State's arguments regarding the appropriate "benchmark" in our Motion to Dismiss, but we did offer to address them at the Court's request. In any event, the District of Columbia court's decision is simply not final; the State is free to seek reconsideration of the benchmark at the Section 5 trial and if it loses, to appeal the issue to this Court after a final judgment is entered. The use or misuse of the interim plan by another court casts no doubt on the validity of the Mississippi district court's decision to substitute a clearly valid plan in place of one that has been objected to by the Attorney General.[13]

2. Appellants argue (82-233 J.S. 8-30) that the district court erred in deferring to the State's policy of preferring to retain two districts with substantial black populations and thereby rejecting their proposed plan, which would have provided blacks with at least one black district with a substantial majority. We do not agree with appellants that the district court erred in adopting the Simpson plan.

This Court last Term in *Upham* v. *Seamon*, 456 U.S. 37 (1982), set out general principles for a district court to apply

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[13]Although not directly challenged by the State, the district court's refusal to allow elections to be conducted under the 1972 congressional districting plan was also plainly correct. Article I, Section 2 of the Constitution mandates redistricting in line with the Decennial Census, and requires that "as nearly as practicable one man's vote * * * is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964), quoted in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-528 (1969). The 1972 plan contains a total population variance of 17% and thus, absent compelling exigent circumstances, such a plan could not be adopted, even on an interim basis.

when, in the face of a Section 5 objection to a legislative redistricting plan, the court itself must adopt an interim plan. First, this Court in *Upham* held that an interim plan should meet the express objection interposed by the Attorney General. 456 U.S. at 41. In our view the district court correctly applied this principle by adopting a plan which does not fragment the Delta.

Appellants argue (82-233 J.S. 8, 9, 12-14) that one of the Kirksey plans should be adopted because the Attorney General, when interposing his objection to S.B. 2001, implicitly objected to any plan that does not create one district with a black majority of 65%. This is simply not an accurate reading of the Attorney General's objection. In terms, the objection letter—while alluding to a time in the past when there was a 65% district—objects only to the fragmentation of the Delta by use of horizontally drawn district lines. See J.S. App. 27a-28a. The letter did not state, nor does the Attorney General maintain, that a 65% black district is required for purposes of Section 5 preclearance. The State has chosen to seek preclearance of S.B. 2001 in the District Court for the District of Columbia, and appellants, as intervenors in the preclearance suit (J.S. App. 31a), are free to make any argument they believe appropriate as to whether S.B. 2001 complies with Section 5. The Simpson Plan reunites the Delta. No more was required by the Attorney General's objection to S.B. 2001.

Second, this Court held in *Upham* that the redistricting court should respect the political policies of the State as reflected in the districting scheme adopted by the state legislature. The district court conscientiously applied this standard and found that the Simpson plan properly satisfied three State policies as well as or better than the Kirksey plans, viz., preserving incumbents' constituencies, maintaining a de minimis population deviation, and creating two black districts with at least 40% black populations (J.S.

App. 14a).[14] In addition, the court found that the Simpson plan preserves a community of interest in all the districts. We submit that the district court's approach in attempting to choose the interim plan that the State legislature most likely would have adopted was fully consistent with the teaching of this Court in *Upham*.

3. This case was decided by the district court on June 8, 1982. On June 29, 1982, the President signed into law the Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 *et seq.* Section 3 of that Act amends Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, so that it now provides (96 Stat. 134; emphasis added):

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color * * *.

Congress explained in Section 3 what it meant by a voting procedure "resulting" in a denial or abridgement of the right to vote on account of race or color:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens

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[14]The district court made no specific findings regarding the actual existence of a swing-vote influence of blacks in Mississippi and there is no basis to presume that the State's policy is an impermissible one. Obviously, if the State's policy were shown to be the product of an intent to discriminate, it would be an abuse of the court's equitable discretion to adopt a plan to further that policy. See *Connor* v. *Finch, supra*, 431 U.S. at 421; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 639 (1976); *Chapman* v. *Meier*, 420 U.S. 1, 17-19 (1975). Cf. *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975).

protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

In light of Congress' action, we think that the district court should reconsider the Simpson plan, and the other plans presented to it, under the new standards in amended Section 2. Congress intended the Act to take effect immediately (Section 6, 96 Stat. 135) and that it be applied in pending cases. See 128 Cong. Rec. S 7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H 3841 (daily ed. June 23, 1982) (remarks of Reps. Sensenbrenner and Edwards). See also *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711 (1974). Under the pressure of an impending election, and given only a few plans from which to choose, courts must have considerable discretion in adopting an "interim" plan. Nonetheless, this Court has pointed out that a reapportionment "court should follow the appropriate Section 5 [of the Voting Rights Act of 1965] standards," *McDaniel* v. *Sanchez,* 452 U.S. 130, 149 (1981), quoting S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975), in devising an interim plan. It is unreasonable to assume that Congress intended for the reapportionment court to follow Section 5, but ignore Section 2 of the Voting Rights Act. Accordingly, a remand in order to evaluate the validity of the Simpson plan under Section 2 is consistent with Congress' intent.

On remand, the district court should examine the existing record along with any appropriate supplemental evidence,

pursuant to amended Section 2 standards. Under those standards, the district court should consider the following two points: (1) whether, as a factual matter, the record establishes that blacks are afforded equal access to the political process in districts in which they constitute a substantial minority of at least 40% of the population, and (2) whether the state policy found by the court, favoring creation of two "high impact" districts, is in fact not "tenuous," *i.e.*, is divorced from maintenance of racial discrimination.

One of the state policies which the district court found and to which it accorded deference was an apparent policy to distribute the black vote so that it would constitute 40% or more of at least two districts, rather than concentrating the black population in one district to create a black voting age population majority. The district court correctly reasoned that neither the Constitution nor the Voting Rights Act requires either proportional representation or a "safe" minority seat (J.S. App. 13a). The "adequacy of representation is not measured solely by the black community's ability to elect its first-choice candidate." *City of Rome* v. *United States*, 472 F. Supp. 221, 248 (D. D.C. 1979), aff'd, 446 U.S. 156 (1980). In addition, the district court pointed out that having the ability to exert a swing-vote influence in two districts could well be more advantageous to minority interests than having a reasonable ability to choose a single candidate, if that means being excluded from having any real influence in all other districts. See *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981); *United States* v. *Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978). The district court did not, however, make a factual finding that blacks have such a "swing-vote" potential in Mississippi.

Such a finding is required by the standards Congress subsequently prescribed in amending Section 2. In determining whether members of a racial group have "less

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (Section 2(b), as amended by Pub. L. No. 97-205, 96 Stat. 134), courts must now make factual findings with respect to several, objectively measurable factors. Among these factors are the extent to which voting in the state or subdivision is racially polarized and the extent of any past discrimination that has "touched the right of the members of the minority groups to register to vote or otherwise participate in the democratic process."[15] Congress was well aware, however, that racially polarized bloc voting — or any of the other objective factors necessary to prove discriminatory "result" — could not be presumed to exist. S. Rep. No. 97-417, 97th Cong., 2d Sess. 33-34 (1982).[16]

In addition, the Senate Report accompanying the amended Voting Rights Act instructs that under Section 2, courts should consider "whether the policy underlying the state['s]* * * use of [a particular apportionment scheme] is tenuous" (S. Rep. No. 97-417, *supra*, at 29). This phraseology is taken directly from *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds, 424 U.S. 636 (1976). In that case, the court described a "non-

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[15]S. Rep. No. 97-417, *supra*, at 28-29. There is some relevant evidence in the present record. The parties have stipulated, for example, to an extensive history of discrimination (Ex. P-1, Stipulation Nos. 1 to 8), a present inhibitory effect on black voting of that past discrimination (*id.*, Stipulation No. 9), and to a prevalence of racial bloc voting such that absent a black voting age population majority of 60%, blacks generally have no opportunity to elect representatives of their choice (*id.*, Stipulation Nos. 10 and 16). The district court may well take additional evidence, including evidence concerning the results of the 1982 congressional party primaries and elections.

[16]Congress also made absolutely clear that the failure of black candidates to win elections could not in itself constitute a prima facie case of discriminatory "result." See Section 2(b) and S. Rep. No. 97-417, *supra*, at 31-33.

tenuous" state policy as one which is "strong" and "divorced from the maintenance of racial discrimination [citation omitted]" (485 F.2d at 1305).

No one contends that state Representative Simpson, the author of the plan adopted by the district court, devised his plan with any intent to dilute the black vote. It is undisputed that the State has, since 1966, in fact maintained 40%-plus, but not majority, black districts, and that Thomas D. Campbell, Chairman of the Joint Apportionment Committee, had been an advocate of that approach. Certainly it lies within the prerogatives of the State of Mississippi to determine which of several non-discriminatory alternatives best achieves the State's policy objectives. A three-judge district court sitting in that State has concluded that two 40%-plus districts achieve the State's legitimate objectives better than a single majority district. The court, however, made no determination, necessary to a Section 2 analysis, as to whether the record supports the conclusion that the apparent State policy, embodied in the Simpson plan, is "non-tenuous."[17]

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[17]The district court's determination that an effort to design a majority black district constituted a racial gerrymander (J.S. App. 13a-14a) is no substitute for the essential Section 2 inquiry. Indeed, in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), this Court recognized that race consciousness is often legitimately a part of reapportionment. Legislatures and courts may deliberately create majority black districts when necessary to comply with the requirements of the Voting Rights Act. See *ibid.*; *Mississippi* v. *United States*, 490 F. Supp. 569 (D. D.C. 1979) (three-judge court), aff'd, 444 U.S. 1050 (1980).

CONCLUSION

The order of the district court rejecting S.B. 2001 as an interim redistricting plan should be affirmed. The order of the district court adopting the "Simpson proposal" as an interim plan until the State preclears a new plan should be vacated and the case remanded for further findings in light of the intervening amendment of Section 2 of the Voting Rights Act of 1965.

Respectfully submitted.

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